LAW OFFICES OF
PRINGLE & HERIGSTAD, P.C.

ROGER O. HERIGSTAD
MARK E. PURDY
JAN M. SEBBY
DONALD A. NEGAARD
JAMES E. NOSTDAHL
JOHN J. PETRIK
CAROL K. LARSON
DAVID J. HOGUE
REED A. SODERSTROM

BREMER BANK BUILDING
20 SW 1ST STREET
POST OFFICE BOX 1000
MINOT, NORTH DAKOTA 58702
(701) 852-0381
FAX (701) 857-1361
E-mail: pringle@ndak.net

MARK R. HAYS
THOMAS A. WENTZ JR.
DONALD T. CAMPBELL
MICHAEL A. BOSH
BRENT M. OLSON
DENISE C. HAYS

OF COUNSEL
HERBERT L. MESCHKE

RETIRED
THOMAS A. WENTZ

TRANSMITTED VIA UPS OVERNIGHT

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Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

IN THE MATTER OF FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE - CC DOCKET NO. 96-45

Please find enclosed for filing in the above-named matter the original and four copies of North Dakota Rural Telephone Company Group Comments on Western Wireless Petition for Preemption of South Dakota PUC Order.

Michael A. Bosh
Pringle & Herigstad, P.C.

jb
encs.
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	**CC Docket No. 96-45**
Federal-State Joint Board on	)	
Universal Service	)	

North Dakota Rural Telephone Company Group Comments on Western Wireless Petition for Preemption of South Dakota PUC Order

Jan M. Sebby
Michael A. Bosh
PRINGLE & HERIGSTAD, P.C.
Bremer Bank Bldg., 2nd Floor
20 First St. SW
P.O. Box 1000
Minot, ND 58702-1000

Summary

The North Dakota Rural Telephone Company Group opposes Western Wireless' petition for FCC preemption of states' exercise of their jurisdiction under section 214(e) of the Telecommunications Act of 1996. Neither section 214 nor section 253 requires more than one carrier be eligible to receive universal service support in the service areas of rural telephone companies. Section 253 does not authorize the FCC to preempt state commissions' exercise of "The discretion afforded a state commission under section 214(e)(2) . . . to decline to designate more than one eligible carrier in an area that is served by a rural telephone company . . . ." FCC Docket No. 96-45, Report and Order issued May 7, 1998, 12 FCC Rcd. 8776, par. 135.

Comments

The Rural Telephone Company Group (RTCG) is a group of telecommunications companies providing local exchange service in North Dakota. The rural telephone companies in the North Dakota RTCG are listed on Attachment A.
Each member of the group is:

a) an "incumbent local exchange carrier" (47 U.S.C. § 252(h));

b) a "rural telephone company" (fewer than 50,000 access lines) (47 U.S.C. § 153(37)); and

c) a designated "eligible telecommunications carrier" in its respective service area under the North Dakota Public Service Commission's ETC Orders issued in December, 1997 (47 U.S.C. § 214(e)).

There is now pending before the North Dakota Public Service Commission Western Wireless' application for designation as a "competitive eligible telecommunications carrier," under 47 U.S.C. § 214(e), and 47 C.F.R. §§ 54.5, 54.201 and 54.307. ND PSC Case No. PU-1564-98-428. The RTCG intervened and opposed Western Wireless' application. In these proceedings, the North Dakota RTCG opposes Western Wireless' petition for FCC pre-emption of states' exercise of their jurisdiction under section 214 of the Telecommunications Act of 1996.

In these comments, the North Dakota RTCG does not address why the South Dakota PUC decision should be sustained or whether a preemption collateral attack is a permissible alternative to appeal processes. Presumably those issues will be addressed by South Dakota interests and other commenters. The North Dakota RTCG comments are focused on a fundamental issue: The plain words and underlying policy of the Telecommunications Act of 1996 and the FCC's Orders and Rules to implement the Act do not require a state commission to designate any competitive eligible telecommunications carrier in rural service areas.

In North Dakota proceedings that parallel the South Dakota proceedings, Western Wireless has contended: "The fundamental question . . . is whether new entrants, including a commercial mobile radio services ("CMRS") provider, can utilize universal service funds to meet basic (and advanced) telephone needs of North Dakota consumers." (Western Wireless Brief in ND PSC Case No. PU-1564-98-428, p. 1.) The wrong answer proposed by Western Wireless in the North Dakota proceedings is: "The Commission should use the ETC process to promote the deployment of these wireless services as envisioned by the Act." (Western Wireless Brief, p. 33.)

Western Wireless now implores the FCC to ". . . send the SDPUC and other state commissions a clear message that they must designate a [competitive] carrier as an ETC." (Petition for Preemption, p. 9.) The suggested clear message is clearly contrary to clear provisions of section 214(e) of the Telecommunications Act of 1996 that reserve to state commissions the responsibility to determine whether more than one carrier should be eligible to receive support for universal service in rural service areas. Western Wireless' petition is clearly contrary to the FCC's previous actions to implement the Act where the FCC reiterated state commissions' discretion under 214(e). Western Wireless' assault on the discretionary powers of state commissions is also clearly contrary to the decision and opinion of the Court of Appeals for the 5th Circuit issued on July 30, 1999, in Case No. 97-60421, Texas Office of Public Utility Counsel, et al. v. Federal Communications Commission (herein Texas v. FCC).

Western Wireless both expresses and implies a notion that it should have some special access to universal service support mechanisms, simply because it proposes service that uses wireless technology. The North Dakota rural telephone companies assert the fundamental question is whether it is in the public interest for any additional eligible telecommunications carrier to be designated for an area served by a rural telephone company. That is the fundamental question, under section 214(e) of the 1996 Act. To answer this fundamental question is the responsibility of state commissions under section 214(e) of the Act, a responsibility that cannot be usurped by the federal commission.

Regardless of the technology used, any applicant for status as an eligible telecommunications carrier must provide the supported services throughout the relevant service area. And, in the case of an application for status as a second eligible carrier in a rural service area, the applicant must show the state commission there is a public interest in designating an additional carrier, regardless of the technology.

Resolution of this fundamental question - whether more than one carrier should be eligible to receive support for universal service in rural service areas - is the responsibility of state commissions, under section 214(e). "The discretion afforded a state commission under section 214(e)(2) is the discretion to decline to designate more than one eligible carrier in an area that is served by a rural telephone company; in that context, the state commission must determine whether the designation of an additional eligible carrier is in the public interest." FCC Docket No. 96-45, Report and Order issued May 7, 1998, 12 FCC Rcd. 8776 ("the USF Order"), par. 135.

Evidently the FCC's additional remarks in paragraph 136 of the USF Order, referring to section 253 limits on a state commission's action, coupled with the principles of competitive and technological neutrality expressed in USF Order paragraphs 47-52 and in 47 C.F.R. § 201(h), have inspired Western Wireless to contrive a plan and to solicit the FCC's agreement that state commissions are somehow compelled to pursue a course of affirmative action to promote Western Wireless as a competing provider of telecommunications in rural areas, simply because its service uses wireless technology. Western Wireless claims more recent support for its position citing the FCC's May 1999 Seventh Report and Order (Western Wireless Petition, note 27). But the 7th Report and Order (paragraphs 3 and 95) addresses only non-rural carriers. The 7th Report and Order does not purport to limit the discretion (conferred by the Act and acknowledged in the 1st Report and Order) of state commissions to decline to designate more than one eligible carrier in rural service areas.

Western Wireless' use of radio waves to carry telecommunications is neither a reason to deny nor to grant CETC status. Western Wireless' reliance on wireless technology is not a prejudicial factor; it is no factor. The principle of technological neutrality does not support an order by state or federal regulators that Western Wireless (or any other wireless carrier) is the beneficiary of a sort of reversed prejudice/affirmative action program or policy, favoring its CETC designation simply because it uses wireless technology. "In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." USF Order, par. 47.

In the exercise of its discretion under section 214(e), no state commission is obliged by the Act or by the FCC's implementation orders to give special consideration to Western Wireless, simply because it proposes wireless technology to deliver telecommunications service. In its applications to several state commissions for status as a second eligible carrier in rural service areas, Western Wireless must show each state commission there is a public interest in designating an additional carrier in that state's rural service areas, regardless of the technology.

Western Wireless' preemption petition was presaged by its ex parte filings with the FCC dated January 29, and April 2, 1999, including a "Case Study" of "wireless residential service" in "Rural City USA," i.e., Regent, North Dakota. (In South Dakota, Western Wireless uses a different name: "wireless local loop." See preemption petition, p. 5. In the North Dakota proceedings, it coined yet another name, "quasi-fixed wireless universal service. ") Western Wireless asserts "The ability of Western Wireless to offer its Wireless Residential Service in Rural City is dependent upon the establishment of a competitive universal service system that allows competitive carriers to serve the communications needs of high cost consumers and receive universal service funding to cover its costs." (January 29, 1999, ex parte "Case Study," p. 2.) The same business plan is presented in its preemption petition, at pages 5 and 11.

Western Wireless' admission of a business plan to use universal service funds to subsidize its market entry presents a sound and sufficient reason for any state commission to reject its CETC application. Western Wireless' business plan to capture universal service funds to finance its wireless local loop would impose a loss of support for service to consumers who do not chose wireless service, under the "portability" provisions of the universal service rules. 47 C.F.R. § 54.307. To designate Western Wireless (or any other applicant for CETC status) as eligible to receive universal service support can only increase consumer costs in high cost rural areas - contrary to the public interest - by diluting the amount of universal service support available to the incumbent ETC with the inevitable consequence of shifting costs to others on the incumbent company's system and raising their per consumer costs and rates to meet the total costs of service.

Clearly, Western Wireless seeks universal service funding to financially support its existing cellular infrastructure and a fixed wireless local loop that would compete with rural ILECs. The FCC used the words "exploit unjustly" to disapprove the diversion of universal service support that Western Wireless seeks as its windfall from the operation of the portability provisions of the universal service rules. The FCC expressed its reliance on states' commissions to avoid these potential negative consequences under section 214(e). See USF Order, pars. 171-176. (Compare 47 U.S.C. § 251(c)(4), disapproving resale arbitrage.) The North Dakota PSC is also on record as concerned about the misuse of universal service funding. (See USF Order, par. 181.) Western Wireless' business plan of dependency on and exploitation of the universal service system to finance its competitive market entry is adequate reason for a state commission to deny - and for the FCC to support denial of - Western Wireless' application for CETC status.

Under the Communications Act of 1934 as amended by the Telecommunications Act of 1996, the United States has a two-pronged telecommunications policy. The 1996 amendments to the 1934 Communications Act installed a pro-competitive telecommunications policy (47 U.S.C. §§ 251 and 253, Interconnections and Removal of Barriers to Entry). The historical policy of universal service, 47 U.S.C. § 151, was reinforced and articulated in the 1996 amendments:

> "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." Act, sec. 254.

Thus, after the 1996 amendments, the two-pronged telecommunications policy includes 1) a legislated preference for a competitive market structure for the delivery of telecommunications services, and 2) a legislated commitment to preservation and advancement of universal service. The general preference for a competitive market structure is tempered by a series of "rural safeguards" that reflect Congress' realization that rural service areas may not be amenable to a competitive market structure. The safeguard provisions include exceptions to the requirement that more than one carrier should be designated to receive universal service support in a service area (Act, sec. 214(e)):

> "Upon request, and consistent with the public interest, convenience and necessity, the State Commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission . . . . Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest." (Underscoring added for emphasis.)

Under the statutory scheme installed by the 1996 Act, a carrier requesting designation as an eligible telecommunications carrier must "meet the requirements of paragraph (1)" of section 214(e). Generally, the requirements are offering of all supported services throughout the relevant service area. 47 C.F.R. §§ 101 and 201(d). However, whether any competitive eligible telecommunications carrier (Western Wireless or any other carrier) should be designated in rural service areas is a matter to be determined by the state commission. 47 U.S.C. 214(e). ". . . [T]he state commission must determine whether the designation of an additional eligible carrier is in the public interest." See USF Order, par. 135.

Under section 214(e), a state commission must first determine whether any competitive eligible telecommunications carrier should be designated in any rural service area before considering whether a particular applicant meets the requirements to be designated as a CETC. Even though Western Wireless asserts that it should be designated as an additional competitive eligible telecommunications carrier, the threshold issue under section 214(e) is whether it is consistent with the public interest, convenience and necessity for any additional carrier to be designated in rural service areas. Only if and after that question were first answered affirmatively (with supporting preponderant evidence) would the state commission consider whether Western Wireless (or any other CETC applicant) meets the requirements to be designated.

The primary public interest at issue in proceedings under section 214(e) is not competition, not ordinary price competition, and not competition between technologies. The primary public interest issue under section 214(e) is the preservation and advancement of universal service.

As stated, under the "portability" provisions of the universal service rules. 47 C.F.R. § 54.307, designation of any competitive eligible telecommunications carrier (whether it uses wired or wireless technology) to receive universal service support can only increase consumer costs in high cost rural areas. To reduce the amount of universal service support available to the incumbent ETC is to shift costs to consumers on the incumbent company's system and raise their rates to meet the total costs of service. Perhaps that is an appropriate risk and consequence in pure competitive market structure, but it is not a risk that Congress has imposed on consumers in high cost rural service areas. There is no statutory compulsion for more than one carrier to be designated to receive universal service support in high cost rural service areas.

The 1996 Act's general preference for a competitive market structure is tempered by rural safeguard provisions that reflect Congress' realization that rural areas are not amenable to a competitive market structure for the delivery of telecommunications services generally and universal services in particular. The framers of the 1996 amendments perceived the evident disconnect between reliance on a competitive market structure and the achievement of the goals of universal service in high cost areas. To bridge the gap between high costs of service and affordable rates for service, the Congress empowered the FCC to install a system of universal service support, and Congress limited access to universal service support funds in high cost to serve rural areas. 47 U.S.C. § 214(e). Congress has limited its preference for competition in the delivery of supported universal services in these service areas.

The 1996 amendments did not install competition as a one-size-fits-all market structure for delivery of universal telecommunications service. Congress does not rely on competition to accomplish universal service in rural areas. The plain words of section 214(e) providing that an additional eligible telecommunications carrier "may" be designated in rural service areas - as distinguished from "all other areas" where an additional carrier "shall" be designated - clearly indicate that the policy favoring designation of a competitive eligible carrier in "all other areas" does not apply to rural service areas.

Competition is in the public interest, because Congress has made that policy decision in enacting the Telecommunications Act of 1996. But competition is not in the public interest in rural service areas to the same extent as competition is encouraged in all other areas. Congress made a distinction. It would not have been necessary for the "may" and "shall" distinction between rural areas and other areas to be enacted in section 214(e) if Congress wanted competition to be applied universally. Congress is capable of clearly expressing its desires. It has done so. Under section 214(e), Congress has declared as a matter of law that competition is not presumed to be in the public interest to accomplish delivery of supported universal services in rural service areas. Instead of relying on the general principle and policy favoring competition, Congress installed a mechanism for state commissions to determine whether the public interest would be served by more than one carrier being designated as eligible for universal service support in the exceptional circumstances affecting high cost rural service areas.

Indeed, if Congress or the entire society were solely and confidently dependent on competition to deliver universally desirable telecommunications services, there is no apparent need for any universal service support mechanism under sections 214 and 254 of the Act, and no apparent reason for the carrier of last resort mechanisms in sections 214(e)(3) and (4). The installation of these provisions in the Act emphasize the public interest in universal service and shows that competition is not presumed to achieve that public policy goal in rural service areas.

There is a clear difference between sections 214(e) and 253 of the 1996 Act, each with its separate function aimed at accomplishing the two policies of the Act, universal service and competition. Whereas section 253 is a principal legal enactment of the new pro-competitive policy, including delegation of powers for the FCC to pre-empt any state action that amounts to a barrier to entry, section 214 reserves to state commissions the discretion to determine whether a new entrant in rural service areas should be designated to receive universal service support.

This interpretation of the proper balance and relationship between sections 214(e) and 253 and the balance of authority between federal and state regulators is supported by a 1997 amendment to the Act, adding subsection (6) to section 214(e). Only where a carrier is not subject to the jurisdiction of a State Commission - a circumstance that does not exist in South Dakota or North Dakota - is the FCC empowered to designate a second (or third or more) eligible telecommunications carrier to receive universal service support.

Under section 214(e), state commissions have the discretion to decline to designate more than one eligible carrier in an area that is served by a rural telephone company. Though this position may appear to be inconsistent with some expressions of the FCC's comments in its May 7, 1997, Report and Order, e.g., paragraphs 50 and 136, this position is consistent other remarks in the same order, e.g., paragraphs 135 and 171-176. And arguments favoring state commissions' discretion under section 214(e) are consistent with the federal commission's 7th Report and Order, acknowledging the roles of state commissions in administration of universal service policy. More important, maintenance of state commissions' discretion is consistent with the plain words of section 214(e) and is consistent with the plain words analysis of Texas v. FCC. The plain words of section 214 (e) do not oblige any state commission to promote wireless technology by diverting portable universal service funds to finance competitive market entry in rural service areas. The plain words of section 214 (e) do not oblige any state commission to designate more than one carrier to receive support for universal service in rural service areas.

Summary and Conclusion

Section 214(e)'s requirement that state commissions make public interest determinations before designating more than one carrier to receive universal service support in high cost rural areas cannot be ignored. The federal commission's general power under section 253 cannot subtract from or overrule the specific and particular statutory requirement of section 214(e) that state commissions make public interest determinations before designating more than one carrier as eligible to receive universal service support in high cost rural areas. The "still-intact jurisdictional fence created by section 2(b)" also serves to maintain states' powers in determining whether more than one carrier should receive support for universal service in high cost rural areas. Texas v. FCC.

Western Wireless (and any other competing telecommunications carrier) is free (under section 253) to enter any market, using any technology. More than one carrier may provide service in a rural service market area, using any technology, in competition with an incumbent local exchange carrier that has been designated as eligible to receive universal service support under section 214(e). Western Wireless may enter telecommunications markets in rural North Dakota, South Dakota, or elsewhere in rural high cost areas of the Nation if its exercise of business judgment leads it to conclude there exists a competitive market potential that merits the risk of its capital, without depending on universal service funds as a substitute for venture capital.

Whether the number of telecommunications carriers in a rural service area is two or three or more and regardless of the technology used by any of the carriers, neither section 214 nor section 253 requires more than one carrier be eligible to receive universal service support. Section 253 cannot be fairly read to authorize the FCC to preempt or usurp state commissions' exercise of "The discretion afforded a state commission under section 214(e)(2) . . . to decline to designate more than one eligible carrier in an area that is served by a rural telephone company . . . ." USF Order, par. 135.

Dated this 30th day of August, 1999.

PRINGLE & HERIGSTAD, P.C.

By _____
Jan M. Sebby #2738
And
By _____
Michael A. Bosh #5313
Attorneys for Rural Telephone Company Group
Bremer Bank Bldg., 2nd Floor
20 First St. SW
P.O. Box 1000
Minot, ND 58702-1000

ATTACHMENT A

North Dakota Rural Telephone Group

BEK Communications Cooperative
BEK Communications I Inc.
Consolidated Telephone Cooperative
CTC Communications, Inc.
Dakota Central Telecommunications Cooperative
Dakota Central Telecom I
Dickey Rural Telephone Cooperative
Dickey Rural Communications, Inc.
Griggs County Telephone Company
Inter-Community Telephone Company
Inter-Community Telephone Co. II
Loretel Systems, Inc.
Midstate Telephone Company
Midstate Communications Inc.
Moore and Liberty Telephone Company
Nemont Telephone Cooperative, Inc.
North Dakota Telephone Company
Northwest Communications Cooperative
Polar Communications Mutual Aid Corporation
Polar Telecommunications, Inc.
Polar Telcom, Inc.
Red River Rural Telephone Association
Red River Telecom, Inc.
Reservation Telephone Cooperative
Roberts County Telephone Cooperative Association
RC Communications, Inc.
Souris River Telecommunications Cooperative
SRT Communications, Inc.
Stateline Telecommunications, Inc.
United Telephone Mutual Aid Corporation
Turtle Mountain Communications
West River Telecommunications Cooperative
West River Communications, Inc.
Wolverton Telephone Company

CERTIFICATE OF MAILING

A true and correct copy of the foregoing North Dakota Rural Telephone Company Group Comments on Western Wireless Petition for Preemption of South Dakota PUC Order was, on the 30th day of August, 1999, mailed to:

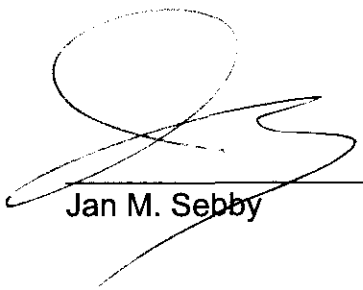
Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554
(original + 4 copies)

Sheryl Todd
Accounting Policy Division
445 12th Street SW, Room 5-A523
Washington, DC 20554
(3 copies)

International Transcription Service, Inc.
1231 20th Street NW
Washington, DC 20037
(diskette only)

Gene DeJordy
Exec. Dir. Of Reg. Affairs
Western Wireless Corporation
3650 131st Ave. SE, Suite 400
Bellevue, WA 98006

Hogan & Hartson, L.L.P.
Columbia Square
555 Thirteenth Street NW
Washington, DC 20004-1109



Jan M. Sebby